No. 03-638

IN THE

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,

Petitioner,

v.

CALDWELL TRUCKING PRP GROUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION FOR RESPONDENT CALDWELL TRUCKING PRP GROUP

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QUESTIONS PRESENTED

Whether Liberty Mutual's failure to raise any federal issues in the state court proceedings until it filed a motion for reconsideration following the New Jersey Supreme Court's adverse decision should result in a denial of review by certiorari.

Whether the New Jersey Supreme Court's interpretation of its own precedent, holding a non-cumulation clause in a comprehensive general liability insurance policy unenforceable where environmental injury to property has occurred over successive years, violates the Due Process Clause or the Takings Clause of the United States Constitution.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The Caldwell Trucking PRP Group ("Caldwell Trucking") adopts the corporate disclosure statement included in the Petition.

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STATEMENT OF JURISDICTION

As explained below, there is a substantial question whether this Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a) (1993), due to Petitioner Liberty Mutual Insurance Co.'s failure to raise any federal questions in the state courts below until it filed a motion for reconsideration before the New Jersey Supreme Court.

STATEMENT OF THE CASE

This Petition seeks to restate issues of state contract law regarding insurance coverage in the guise of constitutional questions. However, the constitutional issues are without merit, and thus the issues are best left to the state courts to resolve. Specifically, Liberty Mutual belatedly seeks to make a federal issue out of the New Jersey Supreme Court's interpretation of its existing, well-established precedents as they apply to a non-cumulation clause in an insurance policy within the context of environmental injury taking place over multiple, successive years. In holding Liberty Mutual's non-cumulation clause to be inapplicable and unenforceable under the circumstances presented, the New Jersey Supreme Court did exactly what state courts have traditionally done as a matter of state law – interpreting their own precedents and State public policy – without running afoul of the United States Constitution. Thus, this case presents issues that are neither novel nor profound.

A. Procedural History

The opinion of the New Jersey Supreme Court below (the "*Spaulding* Opinion")[1] sets forth the procedural history of this matter. Pet. App. 4a-6a. What is not evident from that recitation is that, even though Spaulding's arguments against enforcing the non-cumulation clause have been articulated consistently from the outset, the constitutional challenges raised by Liberty Mutual herein were not raised at all when this matter was first addressed to the trial court, or thereafter to the intermediate appellate court, or even thereafter to the New Jersey Supreme Court. Only ***after*** the New Jersey Supreme Court had rendered its decision against Liberty Mutual did Liberty Mutual first raise constitutional issues, on a motion for reconsideration that is best construed as an eleventh-hour attempt to create federal jurisdiction for this Petition.

Specifically, in moving for partial summary judgment in the trial court, Spaulding expressly challenged the enforceability of Liberty Mutual's non-cumulation clause. Spaulding argued that the non-cumulation clause was inapplicable to a multi-year environmental injury to property in accordance with New Jersey Supreme Court precedent, *Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437, 650 A.2d 974 (1994), and its progeny. In opposing that motion, Liberty Mutual submitted voluminous arguments but

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1. In the New Jersey Supreme Court, this case was captioned *Spaulding Composites Co. v. Aetna Casualty & Surety Co.* While the appeal was pending, Spaulding assigned all of its rights to coverage to the Caldwell Trucking PRP Group, the Respondent herein. For ease of reference, this Brief refers to the insured as "Spaulding" in the state court proceedings and "Caldwell Trucking" with regard to this proceeding.

never once suggested that the result advocated by Spaulding would violate the Contracts Clause, the Takings Clause, or any other constitutional provision. After the trial court granted partial summary judgment to Spaulding and expressly declared the non-cumulation clause unenforceable under the teachings of *Owens-Illinois*, Liberty Mutual sought and was granted leave to appeal on an interlocutory basis by the New Jersey Superior Court, Appellate Division. In neither its brief seeking leave to appeal nor in its brief on the merits to the Appellate Division did Liberty Mutual raise any constitutional challenges to the trial court's decision.

After the Appellate Division reversed the trial court, finding the non-cumulation clause to be unambiguous and enforceable, Spaulding sought and was granted leave to appeal to the New Jersey Supreme Court to seek to reinstate the trial court's judgment holding the non-cumulation clause unenforceable under *Owens-Illinois*. In opposing leave to appeal, Liberty Mutual still did not raise a constitutional issue with regard to the trial court's decision. Indeed, at no time during briefing or oral argument before the New Jersey Supreme Court did Liberty Mutual ever raise a Due Process Clause, Takings Clause, or any other constitutional challenge to the trial court's decision. Not until ***after*** the New Jersey Supreme Court had reversed the Appellate Division and confirmed the trial court's *Owens-Illinois* analysis did Liberty Mutual first raise, on a motion for reconsideration, arguments against retroactivity that were grounded in the Due Process, Contracts, and Takings Clauses. Under the applicable New Jersey court rules, Spaulding did not have an opportunity to oppose Liberty Mutual's belated constitutional arguments, but the New Jersey Supreme Court rejected the motion for reconsideration summarily, without an opinion. Pet. App. 43a.

B. The *Spaulding* Opinion

Much of the *Spaulding* Opinion presents a recapitulation of the New Jersey Supreme Court's 1994 decision in *Owens-Illinois*, a "watershed" opinion in the "cripplingly complex area of long-tail environmental exposure insurance coverage." Pet. App. 16a. The Court explained that *Owens-Illinois* was intended to "develop a fair and uniform methodology for addressing complex environmental coverage disputes" because "traditional techniques of contract interpretation cannot produce a coherent result." Pet. App. 17a-18a (quoting *Owens-Illinois*, 138 N.J. at 471, 650 A.2d at 992). In *Owens-Illinois*, the Court adopted the "continuous trigger" theory, holding that, in cases of progressive indivisible injury or damage resulting from exposure to injurious conditions, courts may reasonably treat the progressive injury or damage as an "occurrence" within each of the years of a CGL policy. 138 N.J. at 178-79, 650 A.2d at 995. Then, policies must respond to a claim on a prorated basis, including claimants' responsibility for periods of self-insurance or no insurance, allocating losses on the basis of the extent of the risk assumed (pro-ration on the basis of policy limits multiplied by years of coverage). *Id.* at 479, 650 A.2d at 995.

In the *Spaulding* Opinion, after reaffirming the allocation method established by *Owens-Illinois* and its progeny and the public policy that led to it, the Court explained why the non-cumulation clause was: (1) inapplicable on its face; and (2) could not be enforced "consonant with the rules adopted in *Owens-Illinois* and affirmed in *Carter-Wallace*." Pet. App. 19a. The non-cumulation clause, on its face, treats a multi-year injury as a single "occurrence" that is covered up to a single insurance policy limit. *Owens-Illinois* and its

progeny held that in multi-year environmental injury cases, each year was a separate "occurrence." Applying that precedent to the language of a non-cumulation clause, the New Jersey Supreme Court concluded that Liberty Mutual's non-cumulation clause did not apply on its face. Pet. App. 21a-22a. Further, the Court held that the non-cumulation clause could not be enforced as advocated by Liberty Mutual because to do so would violate the public policy reflected in *Owens-Illinois* and its progeny. Pet. App. 22a-24a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL ISSUE WAS TIMELY RAISED BELOW.

Under 28 U.S.C. § 1257(a) and long-standing Supreme Court precedent, this Court has no jurisdiction to exercise appellate jurisdiction over a final judgment of a state's highest court unless a federal question has been "raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings." Stern *et al.*, Supreme Court Practice, § 3.18, 175 [8th ed. 2002] (citing *Beck v. Washington*, 369 U.S. 541, 550-54 (1962)). Liberty Mutual bears the burden to show that a federal question was "brought to the attention of the state court with fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997); *see also Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Street v. New York*, 394 U.S. 576, 582 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Indeed, Supreme Court Rule 14.1(g)(i) mandates that petitioner's Statement of the Case specify:

> both in the court of first instance and in the appellate courts, when the federal questions

> sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

As the Petition herein reveals (see Pet. at 15), the federal constitutional questions for which Liberty Mutual now seeks review were not raised in the trial court, nor in the intermediate trial court, nor in the initial proceedings before the New Jersey Supreme Court. In all of their written submissions and oral arguments before the state courts, Liberty Mutual argued strictly issues of state contract and insurance law. Yet, from the outset, it was clear that the issue to be resolved by the courts was whether non-cumulation clauses in a contract were enforceable with respect to environmental property damage claims in light of *Owens-Illinois* and its progeny. The alleged constitutional infirmities occasioned by a negative answer to that question should have been no less apparent in the trial court than they are today. Liberty Mutual either did not think of them or simply chose not to make them.

Spaulding argued in the trial court that *Owens-Illinois* rendered the non-cumulation clause inapplicable and unenforceable, and the trial court so held: "[T]his matter is governed by *Owens-Illinois*, and the 'continuous trigger theory should be utilized. Further, the situation in the matter at bar is analogous to *Owens-Illinois*. For this reason the 'non-cumulation' clause is inapplicable as a matter of law." Pet. App. 42a. No constitutional issue was raised by Liberty

Mutual before the trial court, which explains that court's failure to address any such issue. In seeking reversal of that decision in the Appellate Division, Liberty Mutual sought to distinguish *Owens-Illinois* and its progeny, but did not once suggest that the trial court's decision interpreting *Owens-Illinois* violated the Constitution. The appellate court, which eventually sided with Liberty Mutual, also recognized that the pivotal issue was the effect of *Owens-Illinois*: "[u]nless our Supreme Court's decisions in *Owens-Illinois, supra,* and *Carter-Wallace Inc. v. Admiral Ins. Co.,* 154 N.J. 312, 712 A.2d 1116 (1998), preclude us from giving effect to the clear policy language, the non-cumulation provisions should be enforced." Pet. App. 31a. However, no constitutional infirmity was raised in the briefing or argument before the Appellate Division either.

The New Jersey Supreme Court focused immediately on the core issue presented by the appeal: "[t]he question presented is whether the non-cumulation clause in Liberty's CGL policies can be enforced consonant with the rules we adopted in *Owens-Illinois* and affirmed in *Carter-Wallace.* The answer is that it cannot." Pet. App. 19a. Again, the Court's lengthy explication of *Owens-Illinois* and its application to the facts presented is devoid of any mention of federal issues because, as in the lower courts, at no point in the briefing or argument did Liberty Mutual suggest that to reinstate the trial court's decision would violate the Constitution or any other federal law. It is thus not surprising that, when presented with the "federal afterthought" for the first time on a motion for reconsideration, in which Liberty Mutual argued that retroactive application of the Court's decision would violate due process, see Pet. App. 46a-65a, the New Jersey Supreme Court denied the motion without opinion.

The New Jersey Supreme Court's reaction is justified and consistent with precedent. "Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question." Stern *et al.*, Supreme Court Practice, § 3.18, 181 (citing *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932)). Nor can Liberty Mutual avail itself of the limited exception to that rule based on an "unanticipated act" of the lower court. *See Herndon v. Georgia*, 295 U.S. at 443-44. As demonstrated above, the pivotal issue from the outset was whether *Owens-Illinois* rendered the non-cumulation clause unenforceable; therefore, Liberty Mutual cannot claim in good faith that its motion for reconsideration presented the first opportunity for raising the constitutional challenges to such an extension of *Owens-Illinois*.

Finally, this is not a case where the state's highest court refused to deal with a federal question in an attempt to evade this Court's review. *Cf. Williams v. Georgia*, 349 U.S. 375, 382-83 & n.7 (1955); *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904). Liberty Mutual's failure to raise any constitutional challenge to the trial court's decision refusing to enforce the non-cumulation clause under *Owens-Illinois*, thereby depriving the trial court, the Appellate Division, and even the New Jersey Supreme Court of an opportunity to consider such issues at all or on a timely basis, should be deemed a waiver that deprives this Court of jurisdiction to review the Petition.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE NEW JERSEY SUPREME COURT'S DECISION, GROUNDED ENTIRELY IN NEW JERSEY COMMON LAW PRECEDENT, DOES NOT DECIDE AN ISSUE OF FEDERAL LAW AT ALL, LET ALONE IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER STATE OR FEDERAL COURTS.

Even if the Court concludes that Liberty Mutual properly preserved the federal issues it raises herein, certiorari should be denied because the New Jersey Supreme Court's decision interpreting an insurance contract is grounded entirely in its own precedents and does not address any issue of federal law. Thus, there is no "important federal question" that was decided by a state court of last resort that conflicts with another court, nor is there a question that "has not been, but should be, settled by this Court," as suggested by Supreme Court Rule 10. In short, this matter of insurance contract interpretation does not present "compelling reasons" for granting certiorari. *Id.*

A. The New Jersey Supreme Court Interpreted the Contract Language and Concluded It Did Not Apply On Its Face and Was Unenforceable Under Existing Precedent

More than nine years ago, the New Jersey Supreme Court issued its "watershed" decision in *Owens-Illinois*, a far-reaching attempt to promote the public welfare in the vexing area of allocating insurance coverage for long-tail environmental injuries. Pet. App. 16a. The *Owens-Illinois* Court, convinced of the inadequacy of contract language and traditional rules of insurance policy interpretation, announced

that "courts must adapt common-law doctrines to the peculiar characteristics of toxic-tort litigation." 138 N.J. at 458-59; 650 A.2d at 985. Eschewing "reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation," Pet. App. 19a, the *Owens-Illinois* Court "set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases." *Id.* (citing *Carter-Wallace*, 154 N.J. at 328, 712 A.2d at 1124). Citing authority from numerous jurisdictions, the *Owens-Illinois* Court adopted the "continuous trigger" theory of liability, Pet. App. 8a-9a, and a pro-rata allocation method. Pet. App. 10a-12a.

Significantly, those choices were expressly rooted in identified public policy considerations: "(1) maximizing resources to cope with environmental injury or damage; (2) giving the greatest incentive to insureds to acquire insurance; and (3) notions of simple justice." Pet. App. 13a (citing *Owens-Illinois*, 138 N.J. at 472-73, 650 A.2d at 992). Thereafter, in *Carter-Wallace*, the New Jersey Supreme Court reaffirmed the "continuous trigger" theory and echoed the policy considerations relied on in *Owens-Illinois*:

> [T]his approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs. That method also promotes simple justice, by respecting the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. Additionally, adoption of that allocation method will introduce a degree of certainty and predictability into the complex world

of environmental insurance litigation in continuous-trigger cases.

Carter-Wallace, 154 N.J. at 327-28, 712 A.2d at 1124. *See also Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 172 N.J. 409, 419, 799 A.2d 499, 505 (2002) (noting that the "decision in *Owens-Illinois* was compelled by important public policy considerations, including the need to adapt our tort law to the peculiarities of mass-exposure tort cases").

Thus, although *Owens-Illinois* and *Carter-Wallace* did not address the enforceability of a non-cumulation clause, the precedent was set as to how the Court would interpret such a clause. As noted earlier, non-cumulation clauses are intended to govern situations involving a single occurrence that causes damage over multiple years. Such clauses prevent the accretion of limits when successive policies have been triggered by a single occurrence, in contrast to "other insurance" clauses, which are intended to prevent double recovery where multiple concurrent policies cover a single loss. Because "*Owens-Illinois* clearly rejected the idea that in an environmental exposure case, successive policies are triggered by a 'single' occurrence," Pet. App. 21a-22a, the New Jersey Supreme Court concluded that the "single occurrence" language of the non-cumulation clause "did not implicate 'cumulation' of policy limits for damages arising out of a single occurrence, and was therefore inapplicable by its own terms." Pet. App. 22a.

The New Jersey Supreme Court went on to state that, even if the non-cumulation clause were not facially inapplicable based on the language of the clause itself, the Court would not enforce it because "it would thwart the

Owens-Illinois pro-rata allocation modality. Once the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy." Pet. App. 22a (citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 283 Ill. App. 3d 630, 219 Ill Dec. 62, 670 N.E.2d 740 (App. Ct.), *appeal denied*, 169 Ill. 2d 570, 221 Ill. Dec. 439, 675 N.E.2d 634 (1996)). The Court noted that the pro-rata allocation methodology is grounded in a public policy that "favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." Pet. App. 23a.

For purposes of reviewing the Petition at issue here, the facts are thus very simple. *Owens-Illinois* and *Carter-Wallace* are not on appeal to this Court. Rather, they are the common law of the State of New Jersey in the arena of allocating insurance coverage for long-tail environmental injury. The issue here is the application of prior environmental coverage decisions of New Jersey's highest court to yet another issue in that same arena. The Court's decision below was grounded exclusively in state court precedents and public policy considerations. As explained in more detail in the next section, that is the role traditionally reserved for and exercised by state courts, without the oversight of this Court and without violating the Constitution.

B. The *Spaulding* Opinion Does Not Conflict with Decisions of Other State Courts Within the Meaning of Supreme Court Rule 10

In an attempt to meet the guidelines set forth in Supreme Court Rule 10 for granting certiorari, Liberty Mutual posits a conflict between the *Spaulding* Opinion and decisions of

other state courts. Liberty Mutual is correct that there are many decisions, in New Jersey and other jurisdictions, that stand for the general proposition that unambiguous contracts are to be enforced as written. *See* Pet. at 25-27 & n.8. However, trying to parlay that into a conflict among courts requiring resolution by this Court is disingenuous. Liberty Mutual tacitly admits that the cases are legion in which unambiguous contract provisions are deemed unenforceable by courts on public policy grounds.[2] As noted in section 178

2. Examples of such cases include *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, No. 022075, 2003 WL 22462148, *6-*7 (Va. Oct. 31, 2002) (voiding contract provisions related to delay damages on public policy grounds reflected in statute); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 110, 121, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (Cal. 2000) (voiding contract provision that limited damages on grounds of unconscionability and public policy); *Duffy v. J. Kokolakis Contracting, Inc.*, 278 A.D.2d 445, 447, 718 N.Y.S.2d 639 (App. Div. 2000) (voiding contract provision on public policy grounds to extent it may be construed to require indemnification for appellant's own negligence); *Rogers v. Webb*, 558 N.W.2d 155, 156-58 (Iowa 1997) (voiding on public policy grounds a contingent fee contract with layperson that facilitated dissolution of marriage); *Saxon Constr. v. Masterclean*, 273 N.J. Super. 231, 235-37, 641 A.2d 1056, 1059 (App. Div. 1994) (holding contract clause unenforceable as against public policy because it permitted culpable party to be unjustly enriched at expense of innocent party); *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 63-65, 525 N.W.2d 25, 30-31 (1994) (voiding exculpatory provision as against public policy where gross negligence is involved); *FDIC v. American Cas. Co.*, 843 P.2d 1285, 1290, 1294 (Colo. 1993) (voiding unambiguous insurance policy exclusion for claims brought by FDIC on public policy grounds expressed in state banking law); *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) (voiding exculpatory provision for gross negligence as against public policy); *In re Terminated Aetna Agents*, 248 N.J. Super. 255, 260, 261, 590 A.2d 1189, 1192 (App. Div. 1990)

(Cont'd)

of the RESTATEMENT (SECOND) OF CONTRACTS, "[a] promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (SECOND) OF CONTRACTS, § 178(1) (1981). A court may derive a public policy against enforcement of contractual terms from "the need to protect some aspect of the public welfare. . . ." *Id.* at § 179 & Comment (a) (citing, as examples, policies against restraint of trade, impairment of domestic relations, and interference with duties owed to individuals). The dozens and dozens of cases appearing in the annotations to these sections of the Restatement are a testament to the pervasiveness and acceptability of judicial review of private contracts, and the right of courts to declare contractual provisions unenforceable in the public interest.

Liberty Mutual's only response to this century-old line of authority is to state, without any further analysis, that the present case is distinguishable from "question[s] of interpretation committed to the courts" or "question[s] on the margins of contract enforcement – a question, say, of unconscionability or violation of public policy – where the exercise of reasonable judicial judgment is to be expected." Pet. at 20. How or why such cases are distinguishable from this case – where the New Jersey Supreme Court expressly exercised judicial judgment and relied upon public policy

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(Cont'd)
(public policy interest in ensuring adequate auto insurance for NJ citizens prevailed over enforcement of contract that would undermine that public policy; rejecting Contracts Clause argument); *Toker v. Perl*, 108 N.J. Super. 129, 131, 260 A.2d 244, 246 (N.J. Super. App. Div. 1970) (voiding waiver of defenses clause in installment sales contract as against public policy).

concerns related to environmental cleanup – is not at all clear and Liberty Mutual does not elaborate.

In short, therefore, the "conflict among the courts" upon which Liberty Mutual relies is not a true conflict of the type that calls for the exercise of review by certiorari, but rather an example of the flexibility of traditional common law principles that a state court can apply properly, depending upon the circumstances confronted by that court. There is no reason to open the floodgates to permit federal court review of state court decisions, especially on the basis of this matter where the state judicial decision is clearly grounded in rational and reasonable public policy concerns.

III. THE NEW JERSEY SUPREME COURT'S *SPAULDING* OPINION DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

With regard to the merits of Liberty Mutual's belated constitutional arguments, certiorari should be denied because the New Jersey Supreme Court's decision does not violate the Due Process Clause or the Takings Clause.

A. The New Jersey Supreme Court's *Spaulding* Opinion Does Not Violate the Due Process Clause or the Contracts Clause

In its effort to cloak these state law insurance issues with the mantle of a due process claim, Liberty Mutual seeks to import "the basic constitutional protection of contractual rights afforded by such provisions as the Contracts Clause" into the Due Process Clause. Pet. at 17. Alternatively, Liberty Mutual argues that the Due Process Clause prohibits the imposition of "retroactive civil liability" such as the

New Jersey Supreme Court's decision allegedly imposes on Liberty Mutual. Neither argument has merit.

1. The Contracts Clause

As Liberty Mutual admits, the Contracts Clause by its own terms applies only to legislative enactments. Pet. at 17. The proscription that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," (U.S. Const. art. I, § 10, cl. 1), historically has been interpreted by the Supreme Court to apply to the legislative arm of state government and not the state judiciary. As noted by one commentator, "[t]he Supreme Court has read the [Contracts] Clause this way for at least seventy-five years, consistently refusing to constrain judicial decisions undermining contractual expectations." Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1375 & n.9 (1992) (citing *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924)). Given the Court's long-standing refusal to apply the Contracts Clause ***directly*** to judicial decisions, Liberty Mutual's attempt to apply it ***indirectly*** through the Due Process Clause should not succeed.[3] The absence of any case law permitting

3. The only case cited by Liberty Mutual to support the proposition that the judiciary should not be permitted to do what the Constitution prohibits the legislature from doing is *Bouie v. City of Columbia*, 378 U.S. 347 (1964). That case is limited in scope and easily distinguishable. First, *Bouie* had nothing to do with the Contracts Clause. In *Bouie*, the Supreme Court held that an "unforeseeable judicial enlargement of a criminal statute, applied retroactively" is barred by the due process clause. *Id.* at 353-54. All the cases construing *Bouie* deal with "after-the-fact increases in the degree of punishment" and the "ex post facto construction of substantive criminal statutes." *See, e.g., United States v. Newman*, (Cont'd)

such an indirect importation of the Contracts Clause into the Due Process Clause confirms the validity of that conclusion.

Moreover, as Liberty Mutual acknowledges, even in the case of legislative impairments of contract, only "substantial" impairments are invalid. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). Even then, a "substantial" impairment still may be upheld if it is "necessary" to serve a "significant and legitimate public purpose." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987) (finding that Pennsylvania has a "strong public interest in preventing this type of harm [from mining operations], the environmental effect of which transcends any private agreement between contracting parties"); *see also Energy Reserves Group, Inc.*, 459 U.S. at 412 (identifying "significant and legitimate public purpose such as the remedying of a broad and general social or economic problem"). Once a legitimate public purpose is identified, the court need find only that the legislature's "adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a

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(Cont'd)

203 F.3d 700, 702 (9th Cir. 2000). Nothing in *Bouie* suggests that the Court intended its due process analysis in the criminal context to apply in the civil context, let alone to the Contracts Clause. Second, in *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court clarified that the *Bouie* language stating that the Due Process Clause operated in the same manner as the Ex Post Facto Clause was dicta, noting that "[i]ts rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on ***the constitutionality of attaching criminal penalties to what previously had been innocent conduct***." *Id.* at 459 (emphasis added).

character appropriate to the public purpose justifying [the legislation's] adoption.'" *Keystone*, 480 U.S. at 505 (quoting *Energy Reserves Group, Inc.*, 459 U.S. at 412, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

Conceding, as it must, that "[e]nvironmental cleanup may be an important public interest," Pet. at 20 n.7, Liberty Mutual is left to complain that the decision below "does not even purport to explain why it is 'necessary' to serve that interest by forcing insurers to pay many more times for cleanup than they ever promised to pay." *Id.* But the New Jersey Supreme Court went to great lengths in the decision below to identify and expound upon the significant and compelling reasons why they have chosen to allocate insurance coverage for long-tail environmental injury as *Owens-Illinois* and its progeny do, in furtherance of clearly identified public policy. The fact that Liberty Mutual might prefer to see that interest served by a different allocation methodology does not diminish the vitality or validity of the New Jersey Supreme Court's rationale.

In addition, in rejecting constitutional challenges to state regulation, courts have found it significant that the parties are operating in a heavily regulated industry such as utilities or insurance. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 & n.14 (1983) (oil and gas) (rejecting Contracts Clause challenge to a statutory pass-through prohibition); *Energy Reserves Group, Inc.*, 459 U.S. at 413 (energy); *Calfarm Insurance Co. v. Deukmejian*, 48 Cal. 3d 805, 830, 771 P.2d 1247, 1262, 258 Cal. Rptr. 161, 176 (1989) (auto insurance). In *Calfarm*, the California Supreme Court held that a statutory limitation upon an insurer's power to refuse to renew automobile policies did apply to policies already in existence at the time of the statutory enactment, but did not violate the

Contracts Clause. The Court emphasized, "[i]t is no longer open to question that the business of insurance is affected with a public interest. . . . Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power." *Id.* (quoting *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 329, 74 P.2d 761, 776 (1937)). *See also American Manuf. Mutual Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978) (upholding statute requiring insurance carriers to rewrite insurance contracts retroactively against constitutional challenge because legislature could rationally have concluded that competitive rate system had failed and had resulted in serious financial difficulties for policyholders); *Hinckley v. Bechtel Corp.*, 41 Cal. App. 3d 206, 215, 116 Cal. Rptr. 33 (1974) (holding a law could be applied to existing insurance policies, noting "[t]he cases are legion which hold that the police power of the state to regulate insurance business cannot be contracted away, and the economic interest of the state may justify the exercise of its continuing protective power notwithstanding interference with existing contracts").

Even under traditional contract impairment analysis, therefore, Liberty Mutual's oft-repeated conclusion – that the Court's action if taken by the legislature would be constitutionally invalid – is subject to serious doubt. The Contracts Clause simply cannot serve as a basis for invaliding the *Spaulding* Opinion.

2. Due Process Generally

In response to Liberty Mutual's argument that the decision below constituted a retroactive imposition of civil

liability in violation of the Due Process Clause, the Court need only consider the plethora of cases in which courts routinely adjust the settled expectations of the contracting parties in the name of public policy. *See* page 13, *supra*. Furthermore, not every judicial interpretation of the law that allegedly "surprises" people amounts to a due process violation – not even in the criminal context where due process concerns are often heightened. In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court refused to read the Ex Post Facto Clause into the Due Process Clause or to apply it to judicial decisionmaking. The Court recognized the "important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other," cautioning against placing "unworkable and unacceptable restraint[s] on normal judicial processes" that would be "incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 460. As the *Rogers* Court explained, "[i]n the context of common law doctrines . . . there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves." *Id.* at 461. This has been true throughout the history of our common law courts:

> Common law courts at the time of the framing undoubtedly believed that they were finding rather than making law. But, however one characterizes their actions, the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process

> of judicial evolution at the time of the framing, and it does not do so today.

Id. at 462.

The *Rogers* Court's explanation of the function of state courts applies equally to the decision of the New Jersey Supreme Court in this case. That Court examined an evolving area of the common law and adjudicated what it believed to be the logical extension of its existing precedents. A fair reading of the line of cases starting with *Owens-Illinois* in 1994 leads to the conclusion that the New Jersey Supreme Court's decision was neither "unexpected" nor "indefensible" such that it offended due process principles. *Cf. Rogers*, 532 U.S. at 465 (reviewing Tennessee precedents and concluding that "[t]hese cases hardly suggest that the Tennessee court's decision was 'unexpected and indefensible' such that it offended the due process principle of fair warning articulated in *Bouie* and its progeny.") In short, there is nothing to indicate that the New Jersey Supreme Court's extension of its decision in *Owens-Illinois* "represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Rogers*, 532 U.S. at 467.

B. The New Jersey Supreme Court's *Spaulding* Opinion Does Not Violate the Takings Clause

In a single paragraph in the Petition, citing one "Takings Clause" case, Liberty Mutual argues that the *Spaulding* Opinion below violates the Takings Clause "for essentially the same reasons it violates due process."[4] Pet. at 24.

4. The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amdt. 5.

Caldwell Trucking submits that the *Spaulding* Opinion does not effect an unconstitutional "taking" for the same reasons it does not violate due process. As a preliminary matter, the "takings" issue was not timely raised (*see* Point I, *supra*) and should be deemed waived. As to the merits, Liberty Mutual has not and cannot cite to any Supreme Court precedent whereby the effect of a state court decision allocating property between private parties was held to constitute an unconstitutional taking; there simply is not any such precedent. As the New York Appellate Division observed in rejecting a "takings" challenge to a trial court decision, "[a] regulatory taking challenge is not generally applicable to a court's interpretation of statutes or regulations, or to any burdens imposed as a result of the court's decision; rather, such a challenge is typically directed at statutes or regulations which restrict the use of property." *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 188 A.D.2d 969, 971, 591 N.Y.S.2d 897, 899 (App. Div. 1992) (citing cases).

Put differently, as explained by the District Court for the District of Columbia,

> the Supreme Court has intimated, without ever squarely holding, that a court may effect an unconstitutional taking by force of judgment when it arbitrarily reverses precedent and awards property ***to the state***. The Supreme Court has also recognized that a ***legislative body*** effects an unconstitutional taking when it transfers property, ***without any justifying public purpose***, from one private party to another. [Citations omitted.] It does not necessarily follow, however, that a court effects an unconstitutional taking when its judgment results in the transfer of private property

> to another private party, even if based on erroneous reversal of precedent.

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1406-07 (D.D.C. 1986) (emphasis added), *aff'd*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). Indeed, "unlike a legislature, a court allocates property between individual private parties almost every time it acts in a civil case. In many of those cases, a court must reconsider the applicable precedents. To paraphrase Justice Holmes, the court could not go on if to some extent values incident to property could not be diminished without paying for every change in legal precedent." *Id.* at 1407.

In sum, "only where the property is taken by a court for the public . . . or by the legislature for another private party, with or without a justifying public purpose . . . is the takings clause implicated." *Id.* (citations omitted). The only case cited by Liberty Mutual, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which spawned five separate opinions, adjudicated the constitutionality of a legislative act – a federal statute – affecting benefits for coal miners. Because no property was taken by the New Jersey Supreme Court for the public, and because the Court's decision merely adjudicated the rights of two private parties over property (money), the Takings Clause does not apply at all, let alone to invalidate the *Spaulding* Opinion. By constitutionalizing a private party conflict, Liberty Mutual asks this Court not only to take away from the state judiciaries cases that have always been their domain, but, at the same time, to open the floodgates that have always limited federal court review of state contract cases. Liberty Mutual's blurring of federal/state jurisdiction would reverse a century of jurisprudence in this country . This Petition should therefore not be reviewed.

CONCLUSION

For the foregoing reasons, the Caldwell Trucking PRP Group respectfully requests that the Court deny Liberty Mutual Insurance Company's Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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